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No.

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In The

Supreme Court of the United States

October Term, 1982

RALPH FREDERICK NUNZIATA,

Petitioner,

vs..

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Under the Due Process Clause of the Fifth Amendment, does an accused in a federal felony prosecution have the right to enter a conditional plea of guilty in which the conclusiveness of the plea is conditioned upon the accused's reservation of the right to appeal from an adverse ruling on a pretrial motion to dismiss the indictment for noncompliance with the Speedy Trial Act's timetables for filing of the indictment and the government's readiness for trial?

2. As a matter of due process of law under the Fifth Amendment, once the right or privilege to enter a conditional guilty plea is afforded to the accused, can it be subjected to the requirement of the accused's having to obtain at the time of plea the government's and the court's consent to the entry of such a plea?

3. Under the rule of federal criminal procedure that a voluntarily entered guilty plea waives all prior nonjurisdictional defects in the defendant's prosecution, does an accused who pleads guilty to one count of a multiple-count indictment brought under the National Firearms Act of 1968 charging the accused with the illegal transportation of an unregistered piece of weaponry, to wit, an M-16 lower receiver, waive and withdraw from appellate review the defense that the count fails to charge him with an offense, based on the definition of "firearm" in the Act, or is the substantive insufficiency of the count a nonwaivable jurisdictional defect that can be raised after conviction or on appeal?

4. For purposes of determining the adequacy of legal counsel in a criminal case, under the Fifth Amendment's Due Process Clause's requirement that a plea of guilty must be voluntary and knowingly made and under the Sixth Amendment right of the

accused to the effective assistance of counsel, can a guilty plea to an indictment count be said to be voluntary and intelligently made when the accused's counsel was misinformed as to the applicable timetable and dates of arrest and further prosecution of the accused that may have been controlling on defendant's motion to dismiss under the Speedy Trial Act, and when counsel failed to apprise himself and to advise the accused of the availability of a meritorious defense of the criminal charge's legal insufficiency and further failed to advise the accused of and to take steps to preserve the pleading option of entering a conditional plea of guilty that would have preserved these defenses for further review?

PARTIES TO THE PROCEEDING

The caption of the case in the Supreme Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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No.

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RALPH FREDERICK NUNZIATA,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Ralph Frederick Nunziata, petitioner, by his attorney, Charles A. Giulini, Jr., respectfully shows as follows:

OPINIONS BELOW

The opinions of the district court below were delivered orally from the bench in open court and are spread on the court reporter's minutes but are not otherwise reported. *United States v. Ralph*

Frederick Nunciata, No. 81 Cr. 298 (E.D.N.Y., proceedings of 6/23,/81, 10/5/81).

The memorandum opinion of the circuit court below is not reported in the slip sheets of that court nor in the official reporter. *United States v. Ralph Frederick Nunciata*, No. 81-1357 (2d Cir. April 19, 1982).

JURISDICTION

The date of the judgment sought to be reviewed is April 19, 1982. The time of its entry is also April 19, 1982.

By order dated May 26, 1982, the Honorable Thurgood Marshall, Associate Justice of the Supreme Court, extended petitioner's time to file a petition for writ of certiorari to and including July 19, 1982.

The Supreme Court has jurisdiction to hear the petition by virtue of 28 U.S.C. §1254(1) permitting review by the Supreme Court of cases in the court of appeals by writ of certiorari granted upon the petition of a party to a criminal case after rendition of judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Following are the citations to the constitutional provisions and statutes which the case involves. The provisions cited are set forth verbatim in the appendix: United States Constitution, Amendment V (in part); United States Constitution, Amendment VI (in part); 18 U.S.C. §2; 18 U.S.C. §§921(a)(3), 922(g)(1), 924(a); 18 U.S.C. §§3161(b), 3161(c)(1), 3161(d)(1), 3162(a)(1); 26 U.S.C. §§5841, 5845(a)(6), 5845(b), 5861(j), 5871; Federal Rules of Criminal Procedure 11(c), 11(d), 11(f), 32(d) and 35(b).

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION

On May 13, 1981 petitioner Ralph Frederick Nunziata was indicted under a 15-count indictment for multiple violations of Chapter 44, Title 18 of the United States Code, 82 Stat. 234, 18 U.S.C. §§921 *et seq.*, and of the National Firearms Act of 1968, 82 Stat. 1229, 26 U.S.C. §§5841 *et seq.* He pleaded guilty to Count 6 of the indictment. Count 6 charges him with one act of transporting in interstate commerce an "M-16 lower receiver" that had not been registered in the National Firearms Registration and Transfer Record in accordance with the procedures set forth in Section 5841 of the National Firearms Act of 1968, in violation of Section 5861(j) of the Act, 26 U.S.C. §5861(j). The violation carries a maximum sentence of 10 years' imprisonment and a $10,000 fine. *Id.*, §5871. Petitioner, a first-time offender under the Act, was given six years. His conviction and sentence were upheld by the Court of Appeals for the Second Circuit.

Before the filing of the indictment, petitioner had been prosecuted under a criminal complaint, sworn out August 1, 1980 by an enforcement agent of the Alcohol Tobacco and Firearms Bureau of the U.S. Department of the Treasury. The complaint alleges the shipment of the M-16 lower receiver but alleges the violation of a different statute, 18 U.S.C. §922(g)(1) which prohibits the interstate shipment of a firearm, as defined in 18 U.S.C. §921(a)(3), by anyone previously convicted of a crime punishable by a term of imprisonment exceeding one year in duration.[1] That carries a maximum sentence upon conviction of five years' imprisonment and a $5,000 fine. *See* 18 U.S.C. §924(a).

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1. Petitioner at the time of his prosecution had a state felony conviction on his record. *See* N.Y. Penal L. §5510 [subd. 1(b)]. He had received probation.

On August 12, 1980, petitioner was arrested and brought before the United States Magistrate to answer the complaint. He pleaded not guilty, a preliminary hearing was waived and, upon posting of an appearance bond, he was released.

Exactly 37 days later, on September 18, 1980 or seven days after the expiration of the 30-day arrest-to-indictment time limitation for filing of an information or indictment under the Federal Speedy Trial Act, 88 Stat. 2076, 18 U.S.C. §§3161 *et seq.*, 3161(b) (1976), the Magistrate ordered the complaint dismissed, on the motion of the Assistant United States Attorney.

Nine months later, on May 22, 1981, petitioner voluntarily appeared in court with court-appointed counsel to be arraigned under the indictment. Petitioner was not rearrested, refingerprinted or rephotographed. He pleaded not guilty and a trial date of July 1, 1981 was set, with June 5, 1981 as the due date for motions.

By notice of motion dated June 16, 1981, returnable June 26, 1981, petitioner's counsel moved to dismiss the indictment for exceeding the Speedy Trial Act's arrest-to-indictment and indictment-to-trial time limits. He supported this with a two-page affirmation in which he incorrectly gave August 1, 1980 and September 1, 1980 as the dates of petitioner's arrest under the complaint and the dismissal thereof, respectively, which the district court expressly adopted in denying the motion on the basis of satisfaction of the Speedy Trial Act's time limit of 30 days for the filing of an indictment following an arrest. *See* 18 U.S.C. §3161(b).[2]

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2. September 1, 1980 was a Monday and was Labor Day, when the court was closed.

As critically important as the chronology of the case was to the success of the motion, and as all-important as the motion was in constituting petitioner's sole defense to the indicment,[3] petitioner's counsel did not renew the motion after the Assistant United States Attorney sent a letter to the court with copy to counsel the day after the motion was heard, pointing out the correct complaint dismissal date.[4] In fact, in arguing the motion on the basis of August 1/September 1 operative dates, counsel argued against his own position to the effect that the Speedy Trial Act timetable was not exceeded at all, incorrectly stating the law to be that the government had 35 days after petitioner's arrest in which to return an indictment, or four days more than it assertedly took to dismiss the complaint thereby staying within its time limit.

The same day of and after the Speedy Trial Act motion's denial, petitioner, pursuant to a prearranged agreement with the United States Attorney, offered to withdraw his not guilty plea and to plead guilty to Count 6 of the indictment charging the interstate shipment of the "M-16 lower receiver", in satisfaction of all the counts. Tracking the allocution format prescribed by Fed. R. Crim. P. 11, subds. (c), (d) and (f), to determine the voluntariness of the plea, the district court advised petitioner of his constitutional rights to a speedy jury trial, to confrontation and cross examination of witnesses, and of the consequence of his rights' waiver by pleading guilty; read Count 6 and asked petitioner to tell the court in petitioner's own words what he had

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3. Petitioner changed his plea to guilty as soon as the motion was denied.

4. The District Court relied on counsel's failure to immediately renew the Speedy Trial Act motion on the basis of the actual arrest/dismissal dates, in denying the motion again when it was renewed by substituted counsel in the Fed. R. Crim. P. 32(d) motion for post-conviction relief. *See* appendix at 10a, *infra*.

done;[5] asked the government to relate the proof it was prepared to offer and advised petitioner of the maximum sentence that he could receive. Petitioner acknowledged his awareness of his rights, of the charge brought and the consequences of a guilty plea, and proceeded to plead guilty to Count 6. Finding a factual basis for it, the district court accepted the plea and, on September 11, 1980, imposed the sentence of six years' imprisonment.

Petitioner thereafter retained his present counsel who, by motion made returnable on October 5, 1981, sought to withdraw the plea, pursuant to Fed. R. Crim P. 32(d),[6] on the basis of the government's violation of the Speedy Trial Act by reprosecuting petitioner by indictment filed more than 30 days after petitioner's arrest on the same charge contained in Count 6, and on the basis that the shipment alleged in Count 6 did not meet the statutory definition of firearm in consisting of the lower half of a receiver from an M-16 automatic rifle.[7] Relief was denied; however, upon counsel's application in open court the district court did grant petitioner 30 days, until November 4, 1981, in which to file a notice of appeal[8] and also permitted petitioner to remain free on bail which was reimposed. These actions were

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5. In his own words, "What I did, sir, I had in my possession the rear half of a de-militarized M-16 Receiver, or a part of it. I shipped it . . . " *United States v. Ralph Frederick Nunziata*, 81 Cr. 298, Minutes of 6/23/81, p. 9.

6. Fed. R. Crim. P. 32(d) provides that after sentence on a judgment of conviction a defendant may be permitted to withdraw his guilty plea if he can demonstrate to the satisfaction of the court that the failure to do so will result in manifest injustice.

7. *See* 18 U.S.C. §921(a)(3); 26 U.S.C. §5845 [subds. (a) (6), (b)].

8. Under Fed. R. App. P. 4(b), petitioner's time to appeal expired on September 21, 1981 or 10 days from the entry of the judgment of sentence on the criminal docket on September 11, 1981.

taken upon the government's stating that it had no problem and no objection, respectively, with each action.

The appeal was timely brought and perfected. In his brief to the Court of Appeals, petitioner strongly urged in Point I that dismissal of the indictment with prejudice was mandated by the language and purposes of the Speedy Trial Act, given the correct operative dates. He also argued material variance between the shipped article's description in the indictment and what it actually consisted of. By notice of motion made returnable on March 24, 1982, the date set for oral argument of the appeal, the government moved pursuant to Fed. R. App. P. 27(b) to have Point I of petitioner's brief dismissed, on the ground that he had not reserved the right to appeal the denial of the speedy trial motion at the time he pleaded guilty, by obtaining both the government's and the court's consent to the taking of an appeal.

In its decision dated and entered April 19, 1982, the Court of Appeals acknowledged the rule in the Second Circuit permitting a defendant to enter a conditional guilty plea reserving his right to appeal from adverse pretrial rulings, but held that the rule was inapplicable to petitioner since he was required to obtain both the government's and the court's consent to taking the appeal conformably with the practice in the Second Circuit going back to *United States v. Doyle*, 348 F. 2d 715, *cert. denied*, 382 U.S. 843 (1965). Noting that a speedy trial deprivation is a nonjurisdictional defect, the court of appeals held that in light of the petitioner's failure to receive the government's and the district court's approval of an appeal, the defense had been waived as a point for appeal and had to be dismissed.[9] Without classifying

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9. The Second Circuit's disposition, based upon its opinion, should have been to dismiss the appeal from the district court's denial of the speedy trial motion and to otherwise affirm the judgment of conviction entered below. Instead, the judgment was affirmed *in toto*.

it as a nonjurisdictional defect, the court of appeals also held that the defense that the weapon petitioner admitted shipping is not a regulated "firearm" had been waived by petitioner's plea.

Following the court of appeals' affirmance and issuance of a mandate for petitioner's incarceration, petitioner brought a motion in the district court, pursuant to Fed. R. Crim. P. 35(b),[10] for reduction of the sentence. That motion is still pending. Simultaneously therewith, petitioner made application to Associate Justice Thurgood Marshall, pursuant to Supreme Court Rule 20.1, for an extension of time to file for a writ of certiorari so as to allow time for disposition of the Fed. R. Crim. P. 35(b) motion. By order of Mr. Justice Marshall dated May 26, 1982, the application was granted, extending petitioner's time to apply for the writ of certiorari to and including July 19, 1982.

The basis for federal jurisdiction in the district court is that the illegal manufacturing and dealing in firearms with which petitioner is accused are alleged to have occurred in interstate commerce and, therefore, are subject to federal regulation and prosecution under the Commerce Clause. The federal district court has federal question jurisdiction over criminalized acts which are proscribed and criminalized by federal law.

REASONS FOR GRANTING THE WRIT

This case presents for review two important questions of federal criminal procedure that have not been but should be decided by the Supreme Court, and as to which the federal courts are in conflict. The questions pertain to the effect upon an accused's appeal rights of a plea of guilty, and specifically whether

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10. Fed. R. Crim. 35(b) permits the district court to reduce a sentence after it has been imposed.

a conditional guilty plea, in which the accused reserves the right to appeal adverse pretrial rulings, constitutionally can be made subject to the requirement of obtaining the government's and the district court's consent to such plea. The second question is whether a guilty plea waives appellate review of the legal sufficiency of the charge to which the accused pleads. Point II of the Argument presents the question of the voluntariness of petitioner's plea.

I.

CONFLICT AMONG THE CIRCUITS WITH RESPECT TO GUILTY PLEAS

A. Constitutionality of Conditional Guilty Plea Procedure

A conditional guilty plea is a plea of guilty entered upon the condition that the defendant preserves the right to appeal prior rulings of the district court on an alleged defect in the prosecution that, if decided in defendant's favor, would prove dispositive of the case. *United States v. DePoli*, 628 F. 2d 779 (2d Cir. 1980); *United States v. Lace*, 669 F. 2d 46, 53 (2d Cir. January 5, 1982) (Newman J., concurring in result). The concept was fashioned in the Second Circuit by Judge Friendly, in his unanimous opinion in *United States v. Doyle, supra*, 348 F. 2d at 718-19, and thereafter received wide currency in the Second Circuit. *United States v. Mann*, 451 F. 2d 346 (1971); *United States v. Rothberg*, 480 F. 2d 534 (1973); *United States v. Burke*, 517 F. 2d 371 (1975); *United States v. Rico*, 594 F. 2d 320 (1979). The plea has also been adopted as a permissible pleading option in the District of Columbia and in the Third and Eighth Circuits, *Coleman v. Burnett*, 477 F. 2d 1187 (D.C. Cir. 1973); *United States v. Moscow*, 588 F. 2d 882 (3d Cir. 1978); *United States v. Clark*, 459 F. 2d 977 (8th Cir.), *cert. denied*, 429 U.S. 880, 34 L. Ed. 2d 135 (1972). The First Circuit has declined to rule on its acceptability. *United States v. Warwar*, 478 F. 2d 1183, 1185 n. 1 (1973).

As the Supreme Court noted in *Lefkowitz v. Newsome*, 420 U.S. 283, 289-90, 292-93, 43 L. Ed. 2d 196, 202, 204 (1975), the plea spares "the completely unnecessary waste of time and energy" of conducting a trial where the dispositive issues can be litigated through a full range of appellate review, thereby relieving congestion in criminal trial calendars. Complementing this advantage for the criminal justice system is the preservation of the benefits of and added flexibility afforded to plea bargaining, the defendant being able to tender a guilty plea in exchange for a reduced charge without having to forfeit appellate review of vindication of serious claims of illegality or unconstitutionality in apprehension and pretrial proceedings, as is the case with an unconditional guilty plea. *United States v. Moscow, supra*, 588 F. 2d at 887, Note, *Conditional Guilty Pleas*, 93 Harv. L. Rev. 564, 564-65, 580-81 (1980).

Six of the United States circuit courts appear to reject the concept of pleading guilty upon the condition of being able to appeal prosecutorial defects. The conditional guilty plea has been totally proscribed in the Fourth, Fifth and Ninth Circuits, *United States v. Matthews*, 472 F. 2d 1173 (4th Cir. 1973); *United States v. Benson*, 579 F. 2d 508 (9th Cir. 1978); *United States v. Sepe*, 486 F. 2d 1045 (5th Cir. 1973) (en banc) (per curiam).[11] The Sixth and Seventh Circuits, while condemning the practice, have felt

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11. The Fifth Circuit has equivocated on the issue. In *United States v. Caraway*, 474 F. 2d 25 (1973), *rehearing granted, id.* (en banc), *vacated as moot*, 483 F. 2d 215 (en banc) (per curiam), an appeal of denial of a suppression motion was heard on the merits despite defendant's plea of nolo contendere, the Fifth Circuit panel hearing the appeal pointing to an agreement between the defendant and the district court that the suppression ruling would be preserved for appeal. Sitting en banc, the Fifth Circuit vacated as moot the panel's opinion on the appealability of the suppression issue and on the suppression issue itself, which the panel decided in defendant's favor, resulting in the indictment's dismissal prior to rehearing en banc.

bound to honor it under the extenuating circumstances of its being incorporated into a plea bargain accepted by the court, *United States v. Cox*, 464 F. 2d 937 (6th Cir. 1972) and of the district court's having led defendants to believe they could appeal from a guilty plea, *United States v. Brown*, 499 F. 2d 829 (7th Cir. 1974). The Tenth Circuit, while indicating disfavor with the conditional plea, has not formally prohibited the practice. *Roeth v. United States*, 382 F. 2d 96 (1967), *cert. denied*, 390 U.S. 1016, 20 L. Ed. 2d 165 (1968); *United States v. Nooner*, 564 F. 2d 633 (1977), *rehearing denied, id.*

By statute in New York, it is an established practice in state criminal proceedings that a defendant who pleads guilty may nevertheless thereafter appeal an adverse ruling on a suppression motion based upon an unlawful search and seizure, a coerced confession or an improper pretrial identification. N.Y. Crim. Prac. L. §§710.20, 710.70 (subd. 2). The defendant is not required to obtain the government's or the court's consent to taking the appeal.

The United States Supreme Court, while praising the New York system as "commendable" in *Lefkowitz v. Newsome, supra*, 420 U.S. at 293, 43 L. Ed. 2d at 204, has yet to consider the issue of the acceptability of a conditional guilty plea and of the requirements for invoking it and availing himself of its benefits that can be imposed on the accused constitutionally without infringing his due process rights under the Fifth Amendment. The Supreme Court has held that even if the Constitution does not require the offering of a procedural option, nevertheless, once it is offered, the conditions for its invocation may not impermissibly burden or chill the exercise of constitutional rights and protections. *North Carolina v. Pearce*, 395 U.S. 711, 724-25, 23 L. Ed. 2d 656 (1969); *United States v. Jackson*, 390 U.S. 570, 581-82, 20 L. Ed. 2d 138 (1968); *see also*, Note, *Conditional Guilty Pleas, supra*, pp. 577-581.

In this case the Second Circuit held that petitioner was not entitled to appeal the district court's denial of his motion to dismiss for noncompliance with the Speedy Trial Act because he had not received the government's and the district court's approval of his appealing that ruling at the time of changing his plea to guilty. Such consent is required by the Second Circuit, and by the District of Columbia and Eighth Circuits, in order for a conditional guilty plea to be accepted. *United States v. Doyle, supra,* 348 F. 2d at 719; *United States v. Mann, supra; United States v. Rothberg, supra; Coleman v. Burnett, supra,* 477 F. 2d at 1195 (D.C. Cir.); *Jaben v. United States,* 333 F. 2d 535 (8th Cir. 1964), *aff'd,* 381 U.S. 214, 14 L. Ed. 2d 345 (1965), *explained in United States v. Doyle, supra,* 348 F. 2d at 719. While the Second Circuit has indicated that the necessary consents need not be expressly given but can be implied from the reticence of the prosecutor or the district court (*see United States v. Burke, supra,* 517 F. 2d at 379; *United States v. Rico, supra,* 594 F. 2d at 321, n. 1), in its opinion below the Second Circuit gave no consideration to the fact that at the hearing on his motion to vacate his plea both the District Court and the government did impliedly assent to petitioner's taking an appeal from his guilty plea, the District Court in granting petitioner's requests to enlarge his time to notice an appeal and to continue his bail, and the government in stating it had no objection to either action.[12]

In conflict with the decision below and with the D.C. and Eighth Circuits, the Third Circuit not only does not require the government's consent to a conditional guilty plea but even permits

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12. If the Second Circuit was relying on the chronological fact that these implicit consents were not obtained until after petitioner had changed his plea to guilty and been convicted and sentenced thereon, deeming the consents to be untimely, then its opinion raises for review the further question of whether the availability of a conditional guilty plea can be restricted as to the time when the accused must take the necessary steps to exercise the option.

the plea over the government's objection. *United States v. Moscow, supra.* This procedure recommends itself particularly inasmuch as it removes the constitutional objectionability of requiring the accused to obtain prosecutorial consent which, following successful negotiation of a favorable plea bargain, will hardly be forthcoming. There would be no reason at that point for the prosecutor to give his consent to an appeal. For him the trade-off for a light sentence is a sure sentence. Rather than surrender the benefit of the plea bargain for him, the prosecutor will withhold his consent, thereby putting the accused in the same position he would be in were the conditional plea not available: having to either accept the lenient sentence offered him and thus forego further assertion of his constitutional claims, or else proceed to trial and appeal knowing that he will face a heavier sentence if he loses. The burden or chilling effect on the assertion of constitutional claims is the same, whether the conditional plea is proscribed entirely or whether it is allowed subject to the government's and the court's consent. *See United States v. Doyle, supra,* 348 F. 2d at 719 n. 4.

The right to appeal from a criminal conviction has been described as "fundamental." *Nance v. United States,* 422 F. 2d 590, 592 (7th Cir. 1970). An appeal from the district court's judgment of conviction is a matter of right. *Coppedge v. United States,* 369 U.S. 438, 441, 8 L. Ed. 2d 21 (1962); *Rodriquez v. United States,* 395 U.S. 327, 329-30, 23 L. Ed. 2d 340, 344 (1969).

Because of the importance of the right of appellate review in federal criminal cases, and the potentially sizeable effect on that right and on plea negotiations and trial calendar conge of the conditional guilty plea, the Supreme Court should grant certiorari in this case to thoroughly review this concept for the first time and to unify the conflicting practices among the circuits as to the availability of the plea option and the manner in which and time when it can be exercised.

B. Waiver Effect of Guilty Plea on Defense of Legal Insufficiency

Under federal criminal procedure, a guilty plea constitutes a break in the chain of events, bringing the case to a close. Consistently with the expectation of finality, it is deemed to waive all prior nonjurisdictional defects in the prosecution, even those amounting to independent claims of deprivation of constitutional rights. *Blackledge v. Perry*, 417 U.S. 21, 29-30, 40 L. Ed. 2d 628 (1974); *Tollett v. Henderson*, 411 U.S. 258, 267, 36 L. Ed. 2d 235, 243 (1973); *La Magna v. United States*, 646 F. 2d 775, 778 (2d Cir. 1981); *United States v. Cox, supra*, 464 F. 2d at 940 (6th Cir.); *Marteney v. United States*, 216 F. 2d 760, 762 (10th Cir. 1954).

By its own terms, however, this rule does not end the inquiry of whether the criminal prosecution is at an end or whether, on the other hand, the defendant may still take an appeal from his conviction entered on his plea. If the alleged defect relates to lack of jurisdiction, to the lack of power of the lower court to hale defendant before it, then the claim is not waived and may be raised on appeal. *Blackledge v. Perry, supra*, (double jeopardy claim); *Menna v. New York*, 923 U.S. 61, 46 L. Ed. 195 (same). The "fundamental premises for the conviction" remain appealable, *United States v. Doyle, supra*, 348 F. 2d at 718-19 (mentioning subject matter jurisdiction); *Roeth v. United States, supra*, 382 F. 2d at 98 (10th Cir. 1967).

Relying on *United States v. Mann, supra*, 415 F. 2d 346 (2d Cir. 1971) (per curiam) holding the Sixth Amendment speedy trial deprivation to be a nonjurisdictional defect, the Second Circuit below ruled that petitioner's claim of a Speedy Trial Act violation was nonjurisdictional and therefore was waived by his guilty plea. As to petitioner's argument in the District Court on his Rule 35(b) motion, and in the Court of Appeals in his brief, that the "M-16 lower receiver" petitioner admitted shipping was not a regulated

firearm or regulated component of a firearm, the Second Circuit held that this was a question of fact for the jury that the defendant waived by his plea.

The Second Circuit's opinion is further supported by the rationale such as appears in the *Menna* case, that a guilty plea is an admission of factual guilt, resolving all questions of fact and therefore obviating the need for a trial. *Menna v. New York*, 423 U.S. at 62, n. 2, 46 L. Ed. 2d at 197-98. As Mr. Justice White pointed out in his dissent in *Lefkowitz v. Newsome, supra*, 420 U.S. at 299, a guilty plea conclusively establishes the defendant's factual guilt; there are no factual questions remaining for which a trial is needed. *See United States v. Moscow, supra*, 588 F. 2d at 887.

On the other hand, as the Third Circuit observed in the same *Moscow* case, a guilty plea is an admission, often tacit, to the commission of the particular acts alleged to constitute the crime. *Id.*, 588 F. 2d at 888-89; *see also, North Carolina v. Alford*, 400 U.S. 25, 32, 27 L. Ed. 2d 162, 168 (1970). By the process of deductive reasoning, if the acts do not constitute a crime, it follows that there is no admission to the commission of a crime.

Thus, by the weight of authority, the rule in the circuits is that the defense of failure to charge an offense is not waived by a guilty plea, and the substantive sufficiency of the accusatory instrument remains subject to review on appeal. *Coleman v. Burnett, supra*, 477 F. 2d at 1195 (D.C. Cir.); *Kolaski v. United States*, 362 F. 2d 847, 848 (5th Cir. 1966); *United States v. Sepe, supra*, 474 F. 2d at 789 (5th Cir.); *United States v. Briscoe*, 428 F. 2d 954, 956 n. 2 (8th Cir. 1970), *cert. denied*, 400 U.S. 966, 27 L. Ed. 2d 386, *reh. denied*, 401 U.S. 926, 27 L. Ed. 2d 831 (1971). The failure of the accusatory instrument to state an offense

is deemed a fundamental defect that, by virtue of that fact, can be raised at any time, even in the face of a guilty plea.[13] *United States v. Pheaster,* 544 F. 2d 353, 361 (9th Cir. 1976).

Eschewing both a strict jurisdictional/nonjurisdictional dichotomy and the straightforward reasoning of the D.C., Fifth, Eighth, Ninth and Tenth Circuits, the First Circuit analyzed the appealability of a prosecutorial defect following a guilty plea on the basis of whether or not the defect is "directly related to the substantive matters that would have been presented at trial."

On that analysis, the court found in dictum that a claim of a speedy trial deprivation is not waived by a guilty plea, not involving the determination of the defendant's guilt or innocence by a trial that the defendant chooses to forego. *United States v. DeCosta,* 435 F. 2d 630, 632 (1970). On that analysis, the instanty claim that Count 6 of the indictment fails to allege shipment of a "firearm", going directly to the elements of the crime, was waived by his guilty plea. To that extent, the opinion of the Second Circuit below accords with the First Circuit's view. However, on the issue of the Speedy Trial Act defense's waiver, the two courts are in direct conflict.

The question of exactly what defenses or types of defenses to a federal criminal prosecution are waived as grounds for appeal by a guilty plea is important and should be decided by the Supreme Court. With the circuit courts presently holding conflicting views on the subject, at times expressing divergent views in the context of the same opinion, it seems impossible for an accused to know

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13. In the words of the Tenth Circuit, "[O]ne cannot plead guilty to an offense which is not affirmatively stated in the charge." *Marteney v. United States, supra,* 216 F. 2d at 760.

the consequences of a guilty plea on his appeal rights.[14] As petitioner brings out in Point II, *infra,* this confusion can jeopardize the voluntariness of guilty pleas which rests in good part upon the accused's having knowledge of the rights and defenses he is waiving. Certiorari should be granted to resolve the conflict between the decision of the Second Circuit below and the decisions of the D.C., Fifth, Eight, Ninth and Tenth Circuits as to whether a criminal charge's legal insufficiency is waived as a defense by a voluntary plea of guilty.

II.

THE SECOND CIRCUIT DEPARTED FROM THIS COURT'S STANDARDS FOR ASSESSING A GUILTY PLEA'S VOLUNTARINESS.

Point I of petitioner's argument for granting certiorari proceeds on the assumption that his guilty plea was voluntarily made. The District Court recited the allocution required by Fed. R. Crim. P. 11 [subds. (c), (d) and (f)] in order to ascertain whether there was a factual basis for the plea and to insure that petitioner was aware of the nature of the charge and of his constitutional rights to defend same. The Court of Appeals made no finding on the voluntariness issue, other than to note that petitioner's prior counsel obtained an advantageous plea bargain for his client and that his error on the Speedy Trial Act motion dates may have

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14. Judge Friendly's influental opinion in *Doyle*, 348 F. 2d at 718-19, can be read as supporting the result reached below in this case. Nevertheless, in the same opinion, Judge Friendly advances the opposite view in favor of the appealability of a failure-to-state-a-charge defense following an unconditional guilty plea, stating, at 348 F. 2d 718, "[F]ailure of the indictment to charge an offense may be treated as jurisdictional, . . . "

been harmless.[15] Petitioner raised in the Second Circuit the issue of competency of counsel as it affected the voluntariness and impact of his plea upon his appeal rights, both in his brief and in an answering affirmation opposing the respondent's motion to dismiss Point I of petitioner's brief. In a series of three cases commonly known as the Brady Trilogy [*Brady v. United States*, 397 U.S. 742, 25 L. Ed. 2d 747; *McMann v. Richardson*, 397 U.S., 759, 25 L. Ed. 2d 763; *Parker v. North Carolina*, 397 U.S. 790, 25 L. Ed. 2d 790 (1970)], the Supreme Court established that the proper standard for determining whether a waiver of post-conviction relief by a counseled plea of guilty is voluntarily and intelligently made and therefore that due process of law has been satisfied is whether the advice received from counsel is "within the range of competence required of attorneys representing defendants in criminal cases." *McMann v. Richardson, supra*, 397 U.S. at 771, 25 L. Ed. 2d at 773; *Tollet v. Henderson, supra*, 411 U.S. at 266, 36 L. Ed. 2d at 243; *see, McCarthy v. United States*, 394 U.S. 459, 466, 22 L. Ed. 2d 418, 425 (1969). Because the Second Circuit decided the issue without regard to the applicable decisions of the Supreme Court, and because, under that standard, petitioner's plea was not voluntary, the Second Circuit's decision constitutes reversible error.

A plea of guilty to be deemed voluntary must be made intelligently and knowingly—an "intelligent relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S.

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15. Under the "farce and mockery" standard for gauging the denial of the Sixth Amendment right to the effective assistance of counsel, that the Second Circuit alone of all the federal circuits seems to follow, *Barnes v. Jones*, 665 F. 2d 427, 431 n. 4, 434 (2d Cir. Nov. 23, 1981), *cert. granted*, No. 81-1974 (U.S.L.W. 6/8/82), the result reached below may have been correct. But that is not the correct standard applicable to a determination of the effectiveness of a counseled guilty plea as a waiver of all otherwise appealable nonjurisdictional issues.

458, 464, 82 L. Ed. 1461, 1466 (1938). Since a guilty plea is the equivalent of a confession, it must be "an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States, supra,* 397 U.S. at 748, 25 L. Ed. 2d at 756; *McMann v. Richardson, supra,* 397 U.S. at 766, 25 L. Ed. 2d at 771; *cf., Schneckloth v. Bustamante,* 412 U.S. 218, 36 L. Ed. 2d 854 (1973) (knowledge of the consequences is not prerequisite to the legitimacy of a car search since no constitutional rights to a fair trial are being waived).

To make an intelligent decision to plead guilty the accused must be informed and knowledgable as to the consequences of his plea. Note, *Conditional Guilty Pleas, supra,* pp. 564, 568 n. 19. Specifically, if a guilty plea is to have the effect of waiving the accused's right to appeal adverse rulings on procedural claims, the circuit courts have held that the defendant should be aware that appellate review of meritorious claims will be lost. *Coleman v. Burnett supra,* 477 F. 2d at 1195 (D.C. Cir.); *United States v. Caraway, supra,* 474 F. 2d at 28-29 (5th Cir.); *United States v. Benson, supra,* 579 F. 2d at 511 (9th Cir.). A few courts have intimated that it is necessary that the defendant had an idea of his chances on appeal. *United States v. Cox, supra,* 464 F. 2d at 943-44 (6th Cir.); *United States v. Sepe, supra,* 474 F. 2d at 789 (5th Cir.). This is to prevent the guilty plea from becoming a "trap for the unwary", *Lefkowitz v. Newsome, supra,* 420 U.S. at 293, 43 L. Ed. 2d at 204.

Counsel need not advise defendant correctly as to his chances on appeal, or fully as to the appeal procedure, but the advice he gives must be reasonably competent. *McMann v. Richardson, supra.* In *Strader v. Garrison,* 611 F. 2d 61 (4th Cir. 1979), defendant's counsel, by looking in the published regulations of the North Carolina Department of Corrections, could have determined the correct parole eligibility date. His telling defendant that the date was years sooner then it was, on which defendant

relied in agreeing to plead guilty, constituted "gross misadvice" and a denial of the Sixth Amendment right to effective assistance of counsel.

In *Bradbury v. Wainwright*, 658 F. 2d 1083, 1087 (1981), the Fifth Circuit noted:

> "Counsel must be familiar with the facts and the law in order to advise the defendant meaningfully of the options available . . . . This includes the responsibility of investigating potential defenses so that defendant can make an informed decision."

In the case at bar, petitioner's counsel obviously did not familiarize himself with either the facts or the law on the Speedy Trial Act violation. Had he looked at the docket sheet in the court clerk's office, he would have apprised himself within a few minutes of the correct dates of arrest and dismissal. Had he read the relevant statutes, he would have been in a position to correctly urge the correct timetables on the court.[16] Had he looked up the statutory definition of firearm, which is found in the same chapter of Title 26 as that containing the prohibition of an unregistered firearm's shipment, he would have been in a position to advise his client that there was a fair argument to be made that the count did not state an offense. He could then have advised petitioner that, if he did plead to the count, then he should enter a conditional plea conditioned upon reservation of the right to appeal the

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16. Counsel's affirmation in support of petitioner's motion to dismiss was wrong on every other point of law urged with respect to prosecutorial time limits; *viz.*, that the government had 10 days after arraignment to bring an indictment (no such time limitation existed) and the government had to be prepared for trial within six months of arrest [the correct time limit under the Speedy Trial Act was 100 days, *see* 26 U.S.C. §§3161(b), 3161(c)(1)].

insufficiency of the count and the . . .al of the Speedy Trial Act motion.[17]

These shortcomings are a far cry from a lawyer's failure to anticipate changes in the law such as were involved in the *Brady* trilogy and in *Tollet,* which the Supreme Court found not to fall short of the *McMann* standard. But where counsel is unaware of present controlling law and procedure, is ignorant of critical, basic and controlling information and, moreover, fails to take any steps to reargue the defendant's defenses after being notified of the correct information by the government, then he has acted beneath the applicable standard of reasonable competence and his client's plea may not stand. Had the Second Circuit applied the applicable standard, it would have had to reverse petitioner's conviction as being predicated on an involuntary and unintelligent plea made without competent advice of counsel.

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17. Petitioner disagrees with the Second Circuit's suggestion that the result the district court reached, using petitioner's counsel's dates, was correct. Given the questionability of the argument that the prohibitions of the Speedy Trial Act against untimely prosecutions and against reprosecution for the same charge once its initial untimely prosecution has been dismissed are rendered inoperative where the government and not the accused moves to dismiss the initial prosecution, and even were that argument ultimately sustained, reasonably competent counsel would have moved to dismiss the second prosecution, on the basis of the correct Speedy Trial Act dates. The argument for a Speedy Trial Act violation calling for the reprosecution's dismissal, at least as to Count 6, was substantial enough that a reasonably competent criminal lawyer would have urged it and would have counseled the petitioner to preserve it and the failure-to-state-an-offense issue for appeal by taking a conditional guilty plea. Judging from the subsequent history of the case, it is not at all certain that the government would not have consented, for when substituted counsel on October 5th asked for substantial concessions of extension of time and continuation of bail so as to appeal these issues, the government did not hesitate to state it had no opposition to these efforts to take an appeal.

Because the Second Circuit decided the voluntariness issue in a way in conflict with the appiicable decisions of the Supreme Court, certiorari should be granted to review the decision. In granting certiorari recently in *Jones v. Barnes, supra,* 50 U.S.L.W. 3963 (June 7, 1982), in which federal habeas corpus relief from a state conviction after trial was granted because of the inadequacies of appellate counsel in not urging points for reversal of the conviction suggested by the defendant, the Supreme Court has indicated that the effectiveness of a criminal lawyer's representation is an important and timely federal question that is ripe for review. The instant case raises the same question and, therefore, it should be reviewed by the Court in order to arrive at a thorough disposition of the issue.

CONCLUSION

The petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit should be granted.

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July 14, 1982

Respectfully submitted,

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